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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of **UNITED AIR LINES, INC.** **and** **AIR CANADA** **for approval of and Antitrust Immunity for an Alliance Expansion Agreement under 49 U.S.C. §§ 41308 and 41309**	**Dockets OST-96-1434 - 13**

ANSWER OF DELTA AIR LINES, INC.

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August 2, 1996

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On June 4, 1996, United Air Lines, Inc. ("United") and Air Canada ("Air Canada"), and their respective affiliates (collectively referred to as the "Joint Applicants"), filed a Joint Application for approval of and antitrust immunity for an agreement referred to by the Joint Applicants as the "Alliance Expansion Agreement." By Order 96-7-16, the Department established a procedural schedule for responding to the Joint Application.

Delta Air Lines, Inc. ("Delta") hereby files this answer in opposition to the Joint Application. Approval of an antitrust immunized alliance agreement between United and Air Canada -- the dominant Canadian-flag carrier -- in the absence of an open skies agreement that permits U.S. carriers both *de jure* and *de facto* open entry, would represent a serious policy error. The Department's decision to approve an alliance agreement between American and Canadian Airlines International provides no predicate for approval of the United-Air Canada Joint Application. By contrast to Air Canada, which the Department concluded

dominates the overall Montreal and Toronto markets," Canadian International "is a relatively small operator in the Canadian markets." Order 96-5-38. Air Canada's ability to participate in an immunized alliance before the open skies provisions of the U.S.-Canadian bilateral are fully implemented, would give Air Canada and, by extension, United Airlines, an unfair competitive advantage over other U.S. carriers by allowing them to benefit from the protective provisions of the bilateral and enjoy a safe haven against competition by other U.S. carriers in the largest and most important Canadian markets. Delta urges the Department to defer consideration of the United-Air Canada Joint Application until February 24, 1998, the date on which the bilateral phase-in restrictions on U.S. carrier access are eliminated, or in the alternative carve out all U.S.-Toronto/Montreal/Vancouver city-pairs until the bilateral phase-in restrictions expire.

In further support of this Answer, Delta states the following:

1. The Department has established a firm policy to consider applications requesting the grant of antitrust immunity only where a fully effective open skies agreement already exists. Deputy Assistant Secretary Patrick V. Murphy said it best in a recent speech:

> "But even for us to begin to consider an alliance which includes anti-trust immunity will absolutely require a full 'open-skies' agreement and more. I say more

> because we need not only open markets de jure, but we need them de facto."[1/]

2. Secretary Peña also underscored the importance of open skies as a predicate to antitrust immunity in testimony before Congress introducing the Department's "international aviation policy":

> "The existence of an 'open skies' environment, and the elimination of other competitive restrictions, would be key factors in any consideration of a request for immunity."[2/]

3. Open skies must be a pre-condition to consideration of applications for antitrust immunity in order to assure that the alliance would be subject to real marketplace discipline. Such discipline can only be achieved if all U.S. carriers have the unrestricted ability to serve any point in the foreign country from any point in the United States. As the Department stated in the Northwest-KLM case:

> "Because of the open skies accord, any U.S. carrier may serve the Netherlands from any point in the United States. As a result, other carriers have the opportunity and ability to enter the U.S.-Netherlands market and to increase their service if the applicants try to raise prices above competitive levels (or lower the quality of service below competitive levels."

[1/] Speech of Patrick V. Murphy before the 68th Annual American Association of Airport Executives Annual Conference at Las Vegas, Nevada, June 11, 1996 at 14.

[2/] Statement of Secretary Federico Peña before the Committee on Commerce, Science and Transportation, July 15, 1995 at 13-14.

Northwest-KLM, Order 92-11-27.

4. The ability of U.S. carriers to marshal competitive challenges to the United-Air Canada alliance will not exist under the existing U.S.-Canada bilateral agreement until February 25, 1998. Until that date, the U.S.-Canada market could not be characterized as open to new entry and competition. The current U.S.-Canadian agreement imposes significant restrictions on U.S. carrier access to the three largest Canadian cities (Toronto, Vancouver and Montreal). Toronto -- Canada's largest and most important market -- will remain entry restricted for the next year and one half. Under the "phase-in" restrictions of the bilateral, in each of the first two years the U.S. government is permitted to select only two new U.S.-Toronto routes and carriers serving those routes are limited to a maximum of two daily nonstop frequencies. During the third year, the United States is permitted to select up to four additional Toronto opportunities, with each such opportunity limited to only two daily frequencies. Access to Montreal and Vancouver is similarly subject to phase-in restrictions which will not expire for another six months.

5. These phase-in restrictions were expressly designed to give Air Canada a "head start" over U.S. carriers and to protect Air Canada from U.S.-flag competition in its prime markets. It is bad enough that Delta and other U.S.

carriers must continue to labor under the heavy yoke of entry restrictions under the "phase-in" limitations of the bilateral, while Canadian carriers have had unlimited ability to access the U.S. market. It would be untenable for the Department to compound that unfairness by approving the United-Air Canada alliance and thereby allow United to enjoy the benefits of the "phase-in" protections and indirectly to circumvent the access limitations applicable to other U.S. carriers.

6. The limited opportunities available under the phase-in restrictions of the bilateral do not provide sufficient opportunities for other U.S. carriers to effectively discipline an immunized United-Air Canada alliance. The phase-in restriction opportunities do not reflect the full extent of U.S. carrier access requirements in the key Canadian markets. In each of the entry-restricted years, there have been more requests for Toronto authority than there were opportunities available under the bilateral. Applications were filed earlier this week by five carriers for the four Toronto opportunities available in Year 3. Again, as in Years 1 and 2, the Department is required to engage in a carrier selection proceeding.

7. For the past two years, Delta's service between Atlanta and Toronto has been limited to only two daily nonstop flights, preventing Delta from matching Air Canada's four daily nonstops. Furthermore, Delta is unable to serve Toronto from Cincinnati -- its second largest hub -- in its own right (Delta provides services

pursuant to a code share arrangement on flights operated by Comair, with commuter aircraft). Moreover, the bilateral restrictions not only prevent Delta from operating service to meet consumer demand, they would impair Delta's ability to marshal competitive responses to an immunized United-Air Canada alliance. U.S. carriers will be forced to make due with only four additional Toronto opportunities next year while Air Canada, and by extension United, would be free to increase Toronto frequencies without limitation. In short, U.S. carrier access to the major Canadian markets will be governed by artificial governmental restrictions rather than by the marketplace for at least another 18 months.

8. Approval of an immunized alliance with the dominant Canadian carrier in the absence of a fully effective open skies agreement allowing unrestricted access by U.S. carriers to all of the major Canadian cities would turn the Department's international aviation policy on its head. Antitrust immunity should be used as an inducement to encourage expansion of liberal bilateral relationships and shall be available only to those countries that agree to fully liberalize their aviation regimes. By allowing the dominant Canadian carrier to enjoy the fruits of an immunized alliance before open skies becomes a reality would send other restrictive foreign governments, such as the United Kingdom, Japan, and France, a message that those governments' national carriers can obtain antitrust immunity for

alliances even while those those governments continue to insist on entry and other restrictions that protect those national carriers from U.S.-flag competition.

9. Only a few months ago, both United and Air Canada urged the Department not to grant antitrust immunity to U.S.-Canadian alliances until the U.S.-Canada open skies agreement became fully effective:

> ". . . the [U.S.-Canada] Agreement cannot yet be characterized as an 'open skies agreement.'"
>
> "By conferring antitrust immunity upon the joint applicants before the transition periods have expired, the Department would be making the 'carrot' a far less powerful inducement to other nations to sign an 'open skies' agreement with the United States."
>
> "Without this assurance [that other U.S. carriers have the ability to enter U.S.-Montreal/Vancouver/Toronto markets], the Department should not proceed at this time with consideration of the joint application."[3/]

10. Furthermore, the Department's analysis of the competitive effects of the United-Air Canada alliance must examine the market conditions that now prevail, including the existence of an immunized American-CAI alliance. The reduction of competition between United and Air Canada in their overlaps requires careful consideration by the Department. United and Air Canada currently compete (by

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[3/] Answer of Air Canada, February 6, 1996, Docket OST-95-792; Comments of United Air Lines, Inc., February 6, 1996, Docket OST-95-792.

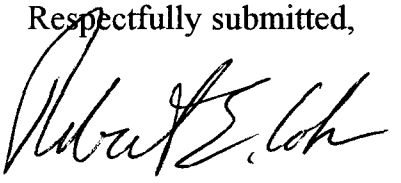
way of direct service or code share service) in 13 overlap markets.[4/] Many of these overlap routes involve hub-to-hub services. The adverse competitive effects are exacerbated by the bilateral restrictions which prevent U.S. carriers from entering the major U.S.-Canadian markets during the phase-in periods. The fact that the American-CAA alliance has been approved does not establish that a United-Air Canada alliance, layered on top of the American-CAI alliance, would meet antitrust standards.

11. Finally, if the Department determines to consider the United-Air Canada application in advance of the elimination of the phase-in restrictions, the Department should carve out from any immunity all of the restricted-entry markets -- i.e., all U.S.-Toronto, Montreal and Vancouver markets, until the applicable phase-in restrictions expire.

For the foregoing reasons, the Department should either defer consideration of the United-Air Canada application until the open skies provisions of the U.S.-Canada bilateral become fully effective, or, in the alternative, carve out from the grant of any immunity all U.S.-Canada markets which are subject to the phase-in restrictions of the bilateral until those restrictions are eliminated.

[4/] San Francisco-Vancouver/Calgary/Toronto, Los Angeles-Vancouver/ Montreal/Toronto,Chicago-Toronto/Vancouver/Ottawa/Montreal/ Winnepeg, Washington, D.C. (Dulles)-Toronto/Ottawa.

Respectfully submitted,



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